Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1979

No. 78-1806

G. T. BRANDON and
BRANDON BROTHERS USED CARS, INC. - Petitioners

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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G. T. BRANDON and
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v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, G. T. Brandon and Brandon Brothers Used Cars, Inc., request that the Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered in these proceedings on May 3, 1979.

1(a)

The opinion of the Court of Appeals was rendered on May 3, 1979 and is unreported.

1(b)(i)

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on May 3, 1979 and it is final by its terms.

1(b)(iii)

The jurisdiction of this court is invoked under the provisions of Title 28 USCA Section 1254(1).

1(c)

In December, 1976, the Grand Jury was conducting an investigation under the odometer law, Title 15 USCA Section 1984, 1990(c). The Grand Jury was scheduled to meet on December 13, 1976 and subpoenas were issued for about six wholesale used car establishments in Calloway County, Kentucky. FBI agents were to serve the subpoenas. The subpoenas called for hundreds of documents, which were to be presented to the Grand Jury that day. There was also a letter addressed to Petitioner, Brandon, and the corporation, which read that pursuant to an official criminal investigation of suspected violations of the federal law, being conducted by the Grand Jury in Western Kentucky, and that they were served with a forthwith subpoena. Agent Bishop went into the office and served the Petitioner, Brandon. He was not advised of his rights. Another agent, Houston, went on the lot where the office was and checked the identification numbers on some cars and the odometer readings on the cars. The odometer readings on three automobiles on the lot resulted in the indictment of the Petitioner for altering the three odometers. At no time was Petitioner, Brandon, the President of the corporation, advised of his rights. Agent Houston never obtained the consent

of the Petitioner to obtain the odometer readings. The question presented is:

(1) Were the FBI agents required to have a search warrant before searching the cars on the Petitioner's property?

The Grand Jury subpoenaed the records of Brandon Brothers Used Cars, Inc., and Brandon, as President, was subpoenaed by the Grand Jury to produce the corporate records. Brandon appeared before the Grand Jury on December 13, 1976, December 15, 1976 and December 16, 1976. He answered questions as to the documents presented and took the fifth amendment at various times throughout the interrogation by the government. An order to show cause was issued against Petitioner, Brandon, and a hearing was held on January 19, 1977. At that time, the court ruled in an opinion and order (EX-1) wherein the court ordered that six questions were to be asked by the government of the Petitioner, Brandon. The order provided that only the six questions shall be answered by the Petitioner and none others. The order further provided, that the Petitioner shall not be required to answer any questions pertaining to individual entries made on any documents, which are produced to him. A subpoena, dated January 14, 1977, requested documentation as to the list of cars which the government agents had inventoried on the Petitioner's property on December 13, 1976. Before the Grand Jury, the prosecution departed from the six questions directed to be asked by the court and asked some thirty pages of questions,

which did not relate to the six questions ordered asked and answered by the court. Brandon was questioned about the very documents relating to the three automobiles for which he was indicted; about entries on those documents and about Jackie Brandon, to whom the Petitioner had sold the automobiles quite some time before the search on December 13, 1976. The question is:

> (1) Should the evidence, and the fruits thereof, given by Petitioner, Brandon, before the Grand Jury, to questions prohibited being asked by the court, be suppressed and not be admissible at the trial of his case?

1(d)

The fourth amendment of the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fifth amendment of the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or

public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

1(e)

On May 15, 1978, the Grand Jury at Paducah, Kentucky, returned a three count indictment against the Petitioners. They were charged in count 1 with altering the odometer on a 1974 Oldsmobile, in order to change the number of miles indicated thereon approximately 104,469 miles to 44,774 miles. Count 2 charged them with altering the odometer of a 1972 Oldsmobile, with the intent to change the number of miles indicated thereon from 100,651 to 48,010. The third count charged the Petitioner with altering a 1975 Oldsmobile odometer with intent to change the number of miles thereon from approximately 49,087 to 29,397. The Petitioners were found guilty under counts 1 and 2, but were acquitted on count 3.

The Petitioners had been in the wholesale used car business for some 28 years. Prior to 1976, Petitioner had bought and sold between 1,000 and 1,200 cars a year. He was getting up in years and was required to be on the road a lot, away from home, attending auctions and buying and selling cars. In 1976, he decided to slow down and stay off the road and spend more time with his family. He had known Jackie Brandon for about 45 years and he was a distant cousin. Bran-

don testified that he made an arrangement with Jackie Brandon to the effect that when the Petitioner purchased an automobile, Jackie Brandon would pay him a hundred dollars over what is called the invoice price or whatever Brandon paid for the car plus the Petitioner's expense in bringing the car to Murray and cleaning up the car. This agreement involves the three Oldsmobiles that are the subject of the three counts in the indictment.

The Petitioners bought automobiles from various wholesale dealers, leasing companies, car rental agencies throughout the United States. The three automobiles in question were purchased by the Petitioner from Royal Auto in Birmingham, Alabama. Royal Auto, through its President, Mr. Newby, when it had cars, would call the Petitioner at Murray, Kentucky and describe the particular car he had and what he wanted for it and what repair work would have to be done. Newby would record that in his office along with the date of sale, the price, the mileage and so forth. The Petitioner would send a bank draft to Royal, which was in an envelope and when Royal got the title papers, they would forward the title papers along with the bank draft to Petitioner's bank at Murray, Kentucky. After the telephone conversation, Brandon's independent contractors, would go from Murray, Kentucky to Birmingham, Alabama and bring the cars back to Murray, Kentucky. As soon as the cars were received on the lot, the Petitioner would inventory the cars, take the odometer mileage readings and the vehicle identification numbers and make sure it was the car he had

purchased. He would then call Jackie Brandon, to whom he had already sold the car, who would then or at a later date, pick up the car and have what mechanical repairs were needed performed on the car. He would return the car to the Petitioner's lot and the Petitioner would do the clean up work on the automobile, namely the paint, upholstery and anything that was needed to be done to the car to put it in good condition, except the mechanical and body work, which Jack Brandon had performed by himself or other people. The three Oldsmobiles in the three counts of the indictment were on Petitioner's property on December 13, 1976, when the agents inventoried the cars and checked the odometer readings. The Petitioner had picked up the cars and actually sold them before receiving the title papers and odometer statements from Royal Auto in Birmingham, Alabama. None of the title papers nor did any of the checks or drafts clear the Petitioner's bank at Murray, Kentucky until after December 13, 1976. They were subsequently picked up and removed from the Petitioner's premises by Jackie Brandon, when the title papers arrived. The evidence and checks were introduced to show that Jackie Brandon had paid for each of the three automobiles.

Under federal law, the seller or transferor of an automobile in the automobile business is required to give an odometer statement. The Petitioner's odometer statements on all three of the automobiles showed the correct mileage. They showed the same mileage as was recorded at Birmingham, by Royal Auto, in addition to the 330 miles from Birmingham to Murray,

Kentucky, the distance traveled by the cars. The Petitioner gave Jackie Brandon an odometer statement for each Oldsmobile in the indictment which showed the correct mileage on the car on the date of its arrival at the Petitioner's lot in Murray, Kentucky. Jackie Brandon signed as the transferee on each odometer statement. His signature was identified on the odometer statements and on the checks that he had given the Petitioners for the automobiles by the banker that Jackie Brandon did business with in Murray, Kentucky. It was established at the trial of the case, that Jackie Brandon was involved in an automobile accident with the Oldsmobile, which is the subject of count 3. This occurred on December 6, 1976, prior to the search by the agents on December 13, 1976. Jackie Brandon was listed as the owner on the police report and he filed a claim against the other car's insurance company and was paid for the damage to the 1975 Oldsmobile, even though title papers had not been transfered nor had Jackie Brandon paid for the car as of that time. Jackie Brandon returned the wrecked Oldsmobile to Petitioner's lot where it was inventoried by the FBI and had the altered mileage on the odometer. This was the course of dealing followed by Petitioner with their dealings with Royal Auto, and other wholesale car dealers and with Jackie Brandon. Jackie Brandon was subpoenaed by the Petitioners at the trial, but was unable to be found and did not appear.

The Petitioner is a wholesale used car dealer and not a retail used car dealer. It was the government's

contention throughout that the Petitioner was a retail used car dealer. The Petitioner had a wholesale car license and a retail car license issued for one person, which was to the Petitioner. The Petitioner buys cars from dealers, leasing companies, and they are brought to his place of business, where they are cleaned up, waxed, polished, upholstered and put in excellent condition. Some of the cars are sold to wholesale dealers, who come to his office. Most of them were taken to auctions. The only time he sells a car retail is to some friend and he has never sold over four or five cars a year retail. Petitioner does not have any salesmen selling cars off of the lot and has but one bookkeeper and three employees, who are engaged in the clean up work on the automobiles. The Petitioner's lot is not open to the general public and they have never been allowed to come on his lot or in his garage. If a member of the general public wanted to buy a car at retail, the Petitioner would refuse them, since he was not interested in the retail business, which involved financing, warranties and other paper work, which was not involved in the wholesale business.

1(g)

The jurisdiction of the United States District Court for the Western District of Kentucky at Paducah, Kentucky, is conferred by Title 18 Section 3231.

1(h)

The Court of Appeals disposed of the Petitioner's Fourth Amendment claim summarily. The Court

stated that the agent's testimony was undisputed and it was to the effect that they entered the used car lot, looked at the automobiles, and were never asked to leave or forbidden to look in the windows and that this was a commercial establishment open to the public. The facts are that the Petitioner did not know that FBI agent, Houston was on his premises taking odometer readings and identification numbers from the cars. Brandon was inside the office talking to FBI agent, Bishop, who was delivering the subpoena and letter and consequently had no opportunity to ask Houston to leave or quit taking the odometer readings or VIN numbers. Agent Houston's testimony was that he could get the VIN numbers from looking through the windshields and the odometer readings from looking through the windows and that he does not remember if he opened the doors of the cars to get the odometer readings or not, because he thought they were locked, but he was not positive. Other testimony was to the effect that you can't get odometer readings from simply looking through the window without opening the car doors. It was brought out on cross-examination that Houston would have had to open some doors to get the VIN numbers and the odometer readings. This was especially true of vans. The court cited the case of Caldwell v. Lewis, 417 U. S. 583, 590 as authorizing the search of the automobile. The Caldwell case went up to the Supreme Court from the Sixth Circuit and this court held that an exterior search of an automobile on a public parking lot was not unreasonable under the fourth and fourteenth amendments. The court held

that no expectation of privacy was violated by the examination of tire on operative wheel or in taking of exterior paint samples from the vehicle which had been parked in a public place. The immediate case does not involve an exterior search, but a search conducted on the premises which were not commercial. True it was a business, but it was a business where the general public was excluded and was not the ordinary run of the mill retail used car lot that are so prevalent. The Petitioner only dealt with wholesalers and not the persons wishing to buy automobiles at retail.

In Katz v. U. S., 389 U. S. 347 at 350, 88 S. Ct. 507, this court held that what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. The case of Wattenburg v. U. S., 388 F. 2d 853 (1968) (9th) presents a very similar fact situation. In that case, Defendants were convicted for conspiring to conceal about a hundred christmas trees which had been taken from the U. S. The evidence shows that the trees were cut and were taken to the premises known as Hide-a-way Lodge. The distance between where the trees were stockpiled and the lodge was from 20 to 35 feet and the stockpile was about five feet from the parking area used by personnel and patrons of the lodge. Wattenburg operated and lived at the lodge and the other Defendant, Owens rented a room there, which he sometimes occupied. Government agents conducted a search on these premises and obtained cuttings from trees which matched the stumps on the government land and a paint smudge on one of the trees which matched that

of the vehicle that transported them. The government contended that the search was good under the "Open Fields Doctrine". The Ninth Circuit held that there was no difficulty in holding that the trees were within the curtilage, but the court went on to hold that it seems to be a more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private. Even in an area, although adjacent to his home, accessible to the public, the court held the search was illegal and the evidence was suppressed. The christmas trees were stockpiled so close to the lodge, which rented rooms to patrons, who used the lodge and the parking lot, that it was protected from a warrantless search. The automobiles in this case were adjacent to the office of the Petitioners and all the evidence was to the effect that it was not a business open to the public in general and was not there for commercial in the sense that the Sixth Circuit used the word. The motion to suppress the odometer readings from the three Oldsmobiles should be suppressed, since it was a search conducted without a warrant on the Petitioner premises.

The court dismissed the Petitioner's claim of abuse of the due process clause and held that this case disclosed no such due process abuse as was involved with U. S. v. Doss, 563 F. 2d 265 (6). In the Doss case, the indictments were dismissed for the reason that the Defendant, who had been secretly indicted by sealed indictments, was called before the Grand Jury that

indicted him and was questioned about the offenses in the indictment. The court held that this was a violation of the fourth and sixth amendment of the constitution and dismissed the indictments. The Court, in the case now before the court stated that it could not ascertain *any prejudice involved in his answers to the six questions which the district court required him to answer.* (Italics ours.) The Petitioners never objected to being asked these six questions nor did the Petitioners claim any prejudice by reason of answering these six questions. The Petitioners contend that the some thirty pages of questioning by the prosecutor, which in no way related to the six questions, violated his fifth amendment privilege in incriminating himself and prosecutor's actions and questions violated the due process clause of the fifth amendment. The Petitioner, on his three previous trips before the Grand Jury, had invoked his privilege against self incrimination on some questions and had answered others. But in his last appearance, the court directed that only six questions be asked and none others. The court had already determined that any other questions propounded by the prosecution in the Grand Jury room, was subject to the Petitioner's former claim of his fifth amendment privilege. The court in effect, told the U.S. Attorney that any questions other than these six, if answered would violate the petitioner's fifth amendment privilege. It cannot be questioned that the U.S. Attorney violated the direct order of the court before the grand jury. The Petitioner was questioned about the very docu-

ments relating to the three automobiles in the indictment. The questions were asked as to entries on these documents, which violated the court's order that the Petitioner was not required to answer any questions pertaining to individual entries on any documents produced to him. These very documents were used in the government's case at trial and the petitioner's motion to suppress these documents was denied. The Petitioner was asked questions about his dealings with Jackie Brandon, who the Petitioner testified actually owned the automobiles at the time they were inventoried on December 13, 1976, by FBI agents. The Petitioner was questioned about other employees who worked for him and numerous other questions in direct disobedience to the court's order.

Chief Justice Berger, in the case of U. S. v. Mandujano, 425 U. S. 564, 48 L. Ed. 2d 212, 96 S. Ct. 1768, stated at 96 S. Ct. page 1778:

> "Under Miranda, a person in police custody has, of course, an absolute right to decline to answer any question, incriminating or innocuous, see Michigan v. Mosley, 423 U. S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 321 (1975), whereas a grand jury witness, on the contrary, has an absolute duty to answer all questions, subject only to a valid fifth amendment claim. And even when the grand jury witness asserts the privilege, questioning need not cease, except as to the particular subject to which the privilege has been addressed. Cf. id., at 103-104, 46 L. Ed. 2d 313, 96 S. Ct. 321. Other lines of inquiry may properly be pursued."

The Court at 96 S. Ct. at page 1776 stated:

> "The stage is therefore set when the question is asked. If the witness interposes his privilege, the grand jury has two choices. If the desired testimony is of marginal value, the grand jury can pursue other avenues of inquiry; if the testimony is thought sufficiently important, the grand jury can seek a judicial determination as to the bona fides of the witness's fifth amendment claim. (Citing Cases), in which case the witness must satisfy the presiding judge that the claim of privilege is not a subterfuge. If in fact 'there is reasonable ground to apprehend danger to the witness from his being compelled to answer,' (Citing Cases), the prosecutor must then determine whether the answer is of such overriding importance as to justify a grant of immunity to the witness."

This case goes far beyond the court's guidelines in Mandujano, *supra*. The petitioner when he was in the grand jury room, with twenty three grand jurors, a court reporter and two assistant U.S. Attorneys, went ahead and answered the questions which the court had specifically prohibited in its order. The government cannot contend that the Petitioner, by not interposing his grounds of privilege, has waived his rights. The court in its order, had interposed the petitioner's fifth amendment rights to any questions other than the six, which it authorized to be asked. If ever there was a violation of the due process clause and the overriding of the petitioner's right not to incriminate himself, this case is the shining example. The U.S. Attorney's office, in spite of the court's ruling, proceeded to use

the Grand Jury as an investigative tool in order to convict the petitioner. The motion to suppress all documents and evidence relating to the three Oldsmobiles in the three count indictment should have been suppressed and not been admissible in the trial of this action.

WHEREFORE, THE PETITIONERS REQUEST this court that a Writ of Certiorari be issued to the United States Court of Appeals for the Sixth Circuit, reversing their decision in this case.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA

v.

G. T. BRANDON, President, Brandon Brothers Used Cars, Inc.

Paducah
C 76-0120 P(A)

ORDER—Entered and Filed January 27, 1977

This action having come on to be heard on the Show Cause Order of the Court and counsel being present in chambers on January 19, 1977, in Paducah, Kentucky, and the arguments of said counsel being heard and the Court being advised in the premises,

It Is Ordered that the defendant G. T. Brandon be and he is hereby ordered to appear before the Grand Jury to be held on February 8, 1977, at Paducah, Kentucky and to answer the following questions as to each document which is produced by him in response to a subpoena duces tecum served upon him on December 13, 1976. This order also applies to any future subpoenas or Grand Jury proceedings that might be held with respect to the defendant. The following questions shall be answered by the defendant and none others:

1. What paragraph of the subpoena served upon you on December 13, 1976, does this document represent?

2. Are these documents kept in the regular course of business of the Brandon Brothers Used Cars, Inc.?

3. Was it the regular course of business of Brandon Brothers Used Cars, Inc. to make a memorandum or record at the time of the transaction described in the document or within a reasonable time thereafter?

4. Please identify the document which has been handed to you and state whether it represents an activity conducted by the Brandon Brothers Used Cars, Inc.

5. What is the practice of Brandon Brothers Used Cars, Inc. with regards to the preparation of this document and to whom was responsibility delegated of preparing the document. Is it the regular practice of Brandon Brothers to prepare and keep the document and all similar documents in the regular course of defendant's business.

6. With respect to the identification of documents, the defendants shall identify each document as to what category it falls in and whether it is a business record, an invoice for billing, a report sent to a leasing company or a data compilation solely to keep a record purely for internal purposes.

Defendant shall not be required to answer any questions pertaining to individual entries made on any document which is produced to him.

(s) Charles M. Allen
United States District Judge

Dated: Jan. 27, 1977
Copies to counsel.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-5396

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* G. T. BRANDON and BRANDON BROTHERS USED CARS, INC., *Defendants-Appellants.*	APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed May 3, 1979.

Before: EDWARDS, Chief Judge, ENGEL, Circuit Judge, and PHILLIPS, Senior Circuit Judge.

EDWARDS, Chief Judge. This is an appeal from a conviction of the proprietor of a used car business, and the corporation on two counts of violating 15 U.S.C. § 1984 and § 1990(c) (1976) by the alteration of odometers on two automobiles.

The individual defendant received a 45-day sentence and a $5,000 fine on each count, with the sentences to be served concurrently. Before this court the appellants contend that Brandon, the owner of the business, suffered constitutional deprivations by the government violating his due process rights in questioning him before a federal grand jury. Both defendants also contend that their Fourth Amendment rights were violated when federal agents entered the used car premises and read the odometer figures, according to the agents, through the car windows. In addition, defendants argue that the two cars in relation to which the convictions occurred had been sold by Brandon

to a cousin, Jackie Brandon, before the agents observed the substantially reduced odometer mileage which established that the odometers had been altered.

Our inspection of the claimed due process abuse before the grand jury disclosed no such due process abuse as was involved in *United States* v. *Doss*, 563 F. 2d 265 (6th Cir. 1977), nor could we ascertain any prejudice involved in his answers to the six questions which the District Judge required him to answer. Appellant appears from the record to have somewhat erratically claimed the Fifth Amendment in relation to some questions and answered without compulsion as to others. As to this issue we find neither due process abuse nor prejudice to the fairness of Brandon's trial.

As to the Fourth Amendment claims, it appears that the District Judge correctly denied defendant's motion to suppress the odometer and vehicle identification numbers applicable to the two vehicles involved in these convictions. The agents' testimony in relation to them was undisputed. It was to the effect that they entered the used car lot, looked at the automobile, and were never asked to leave or forbidden to look in the windows. This was a commercial establishment open to the public, and the owner's expectations of privacy could not be comparable to those situations involving entrance into a home or breaking into an automobile. *See Cardwell* v. *Lewis*, 417 U. S. 583, 590 (1974).

As to defendants' defense, based upon the argument that the cars involved had already been sold to Brandon's cousin, Jackie, these claims were laid before the jury, along with government proofs that clearly indicated that the cars had been purchased by defendants and kept on the lot under the possession and control of defendants until the date of observation of the altered odometers. Under these facts the jury had a right to conclude that defendants were responsible for the alteration.

The judgments of conviction are affirmed.

Supreme Court, U. S.
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No. 78-1806

In the Supreme Court of the United States

OCTOBER TERM, 1978

G. T. BRANDON AND BRANDON BROTHERS USED CARS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1806

G. T. BRANDON AND BRANDON BROTHERS USED CARS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the opinion of the court of appeals (Pet. App. 19-20) nor the memorandum opinion of the district court on petitioners' suppression motion (App., *infra*, 1a-2a)[1] is reported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1979. The petition for a writ of certiorari was filed

[1]"App." refers to the appendix to this brief. "Pet. App." refers to the appendix to the petition. "Supp. App." refers to the supplemental appendix filed in the court of appeals.

on June 4, 1979, and is therefore out of time under Rule 22(2) of the rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether vehicle identification numbers and odometer readings, visible through the windows of automobiles parked on an open used car lot, were obtained by FBI agents in violation of the Fourth Amendment.

2. Whether grand jury testimony, which was not used directly or indirectly as evidence at trial, was "compelled" in violation of the Fifth Amendment where the witness was not required to answer questions put to him but chose voluntarily to respond.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioners Brandon Brothers Used Cars, Inc. and its president, G. T. Brandon, were convicted on two counts of a three-count indictment for violating the Odometer Fraud Law, 15 U.S.C. 1984 and 1990c.[2] The corporate defendant was

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[2]15 U.S.C. 1984 provides:

> No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon.

15 U.S.C. 1990c provides:

> (a) Any person who knowingly and willfully commits any act or causes to be done any act that violates any provision of this subchapter or knowingly and willfully omits to do any act or causes to be omitted any act that is required by any such provision shall be fined not more then $50,000 or imprisoned not more than one year, or both.

fined $2,500 on each count; G. T. Brandon was fined $5,000 and sentenced to 45 days on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. 19-20).

Petitioners buy and sell used automobiles (Pet. App. 19). Uncontested evidence at trial established that the three vehicles named in the three separate counts of the indictment had been purchased by petitioners and that, after the purchase, their odometers had been altered (Supp. App. 228-229, 241, 270-275, 321). Petitioners' contention was that the vehicles, which were concededly on petitioners' property when their odometer readings were recorded by federal agents,[3] had been sold to Jackie Brandon, a cousin of petitioner G. T. Brandon, prior to the alterations (Pet. 5-6). This contention, however, was refuted by petitioners' own records (Supp. App. 292-295, 299-300).

(b) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of any section of this subchapter shall be subject to penalties under this section without regard to any penalties to which that corporation may be subject under subsection (a) of this section.

[3]The odometer readings were obtained by two special agents of the Federal Bureau of Investigation who entered petitioners' used car lot to serve subpoenas issued by a federal grand jury investigating odometer tampering (Supp. App. 160-164). While one agent served the subpoenas, the other inventoried the cars on the lot by noting their year and model numbers. The vehicle identification numbers and the odometer readings were obtained by looking through the windshield and windows of each car (*id.* at 161). The agent taking down the numbers testified that he did not recall having opened the doors of any cars on the lot, with the possible exception of several cars that petitioner G. T. Brandon expressly authorized the agents to examine (*id.* at 161-163, 167).

ARGUMENT

The decision of the court of appeals, on which we generally rely, is correct and does not conflict with any decision of this Court or any other court of appeals.

1. Petitioners contend (Pet. 9-12) that their Fourth Amendment rights were violated when federal agents recorded the vehicle identification numbers and the odometer readings on petitioners' vehicles. As the court of appeals observed, however, the vehicles were located on "a commercial establishment open to the public" and the information was obtained simply by looking through the windows of each vehicle (Pet. App. 20).[4] Moreover, the agents were never asked to leave the lot even after the purpose of their visit was explained (*ibid.*). Indeed, petitioner G. T. Brandon aided the agents by indicating which cars were his, and he denied ownership of the three vehicles subsequently named in the indictment (Supp. App. 162-163, 289-290). In these circumstances, the court of appeals correctly concluded that no constitutionally protected privacy interest was violated. See, *e.g.*, *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978); *G. M. Leasing Corp.* v. *United States*, 429 U.S. 338, 351-352 (1977); *South Dakota* v. *Opperman*, 428 U.S. 364, 367-368 (1976); *Air Pollution Variance Bd.* v. *Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974); *Katz* v. *United States*, 389 U.S. 347, 351 (1967); *Hester* v. *United States*, 265 U.S. 57, 59 (1924).

2. Petitioners also argue (Pet. 13-16) that government counsel's questioning of G. T. Brandon before the grand

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[4]The district court observed that there were "no fences or signs to exclude the public" (App., *infra*, 1a). The physical appearance of the lot thus refutes petitioners' contention that the public was excluded because sales were made only to wholesalers (Pet. 11). Moreover, as petitioners concede (Pet. 9), retail sales were made occasionally.

jury violated his Fifth Amendment rights. This argument is based on a district court order compelling G. T. Brandon to answer six questions before the grand jury. Petitioners interpret this order as precluding government counsel from asking any questions other than the questions listed in the order (Pet. 13).

Petitioner G. T. Brandon appeared before the grand jury on three separate occasions prior to the entry of the order in question. In response to his erratic claims of privilege (Pet. App. 20) and his refusal to identify corporate documents that had been subpoenaed by the grand jury, government counsel obtained an order compelling him to answer six listed questions regarding the identity of corporate documents. The order did not compel him to answer any additional questions. During his fourth grand jury appearance, Brandon answered the questions listed in the order and additional questions as well.[5]

Government counsel violated neither the court's order nor Brandon's Fifth Amendment rights. The order did not preclude Brandon from voluntarily answering other questions, nor did it prohibit the government from pursuing other lines of inquiry. The Constitution does not forbid government counsel from asking incriminating questions of grand jury witnesses, even if those witnesses are targets of the grand jury's inquiry; and it does not preclude a witness from answering such questions voluntarily. *United States* v. *Mandujano*, 425 U.S. 564,

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[5]He initially invoked his Fifth Amendment privilege with respect to some of the additional questions not listed in the court's order. After conferring with his attorney, however, he also answered these questions (Supp. App. 85-86).

574-575, 581 (1976).[6] In any event, petitioners could not have been prejudiced by Brandon's grand jury testimony because that testimony was not introduced at trial and was not used to obtain other evidence.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1979

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[6]The court of appeals correctly distinguished this case from *United States* v. *Doss*, 563 F. 2d 265 (6th Cir. 1977), (cited at Pet. 12-13), which involved a witness who had been secretly indicted and was then called to testify before the grand jury about those very crimes. As the court noted in *Doss*, the grand jury's function terminates with the indictment. 563 F. 2d at 276. Brandon, on the other hand, although a possible target of the grand jury investigation, had not been indicted at the time of his appearance.

[7]The evidence at trial consisted of the information obtained by FBI agents and the testimony of the dealer who sold the cars in question to Brandon. In a statement filed in the district court, the government represented that the dealer's name was obtained from Jerry Walker, a former Brandon employee whose name was already known to the government before Brandon testified.

APPENDIX

MEMORANDUM OPINION AND ORDER—Entered and Filed June 7, 1978

The Court has considered the evidence presented at the hearing on the suppression motion of the defendant, as well as the memoranda of counsel. The Court concludes that the evidence of vehicle identification numbers and odometer readings obtained by the FBI agents on December 13, 1977, should not be suppressed.

The Court has noted the "open fields" doctrine as announced in *U.S.* v. *Hester,* 265 U.S. 57 (1924), and cases thereafter. But, we believe that the doctrine is merely a forerunner of, and is subsumed in, the more recent concept of "reasonable expectation of privacy", *Katz* v. *U.S.,* 389 U.S. 347 at 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). We no longer deal with property law concepts. See *Wattenburg* v. *U.S.,* 388 F. 2d 853 (9th Cir. 1968).

Public access seems to be an important factor in such cases. See *Air Pollution Variance Board* v. *Western Alfalfa Corporation,* 416 U.S. 861 (1974). Here, there was no showing that the public was excluded from the premises, although there may have been no business which the public at large could have transacted there. There are no fences or signs to exclude the public. In the final analysis, the Court finds that there was no subjective expectation of privacy on the part of the defendant as to the exteriors of the vehicles on the lot or as to so much of the interiors as could be observed from outside the vehicles. Further, any such expectation would have been objectively unreasonable.

It is therefore Ordered that the defendant's motion to suppress be Overruled.

(s) Edward H. Johnstone
Judge, United States District Court

Dated: June 6, 1978.